IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

EATON CORPORTATION, et al. — **PLAINTIFFS/COUNTER-DEFENDANTS**

v. — **CIVIL ACTION NO. 251-04-642**

JEFFREY D. FRISBY, et al. — **DEFENDANTS/COUNTER-PLAINTIFFS**

ORDER DENYING MOTION OF NON-PARTY MICHAEL B. WALLACE TO RECUSE THE TRIAL JUDGE FOR LIMITED PURPOSE

Before the Court is the Motion to Recuse the Trial Judge for Limited Purpose, filed by Michael B. Wallace, a non-party counsel of record for Eaton Corp., and the Court, having studied the Motion, the response of the Frisby parties, and the Reply of Attorney Wallace, and otherwise being fully advised in the premises, without the necessity of a hearing, finds that the motion is not well-taken and should be Denied.

Brief Factual History

On May 10, 2012, this Court entered an Order which required, among other things, expedited document production by Eaton. This Order resulted from Eaton's admitted discovery violation- the withholding of four (4) documents that were required to have been produced years earlier. The documents related to the inquiry into Eaton's relationship with former counsel Ed Peters. As the parties are well aware, the Peters inquiry spanned over the course of more than two years, requiring an immense amount of time and resources from all involved. The May 10, 2012 Order was clear in its purpose, stating:

> The Court has outlined the following procedure to: 1) prevent any additional instances of "newly discovered" documents, which are years overdue for

> production; 2) prevent any unnecessary delay, as previously experienced in this case; and 3) prevent any unnecessary expense to any party. Accordingly, the Court orders that the following procedure will be utilized to ascertain preliminary information regarding Eaton's discovery failures and the existence of other responsive document(s) that Eaton failed to produce.

May 10, 2012 Order, pg. 5. The Court went on to order production of additional documents, making known its intent to "ascertain preliminary information regarding Eaton's discovery failures and the existence of other responsive document(s) that Eaton failed to produce." *Id.* Eaton complied, objecting to producing only a small portion of the thousands of additional documents submitted to the Court. The wording of the aforementioned paragraph is important for several reasons. First, the wording leaves no doubt that Eaton was "on notice" of this Court's intention to make sure that no additional documents were being withheld. Second, the wording can only be interpreted that the Court intended to ascertain "preliminary information regarding Eaton's discovery failures." To be sure, the Court made extensive findings in its September 19, 2012 Opinion after its review of the subject documents. However, those findings are made in compliance with the strict mandate which applies to a review of a party's privileged documents. In order for the analysis to be complete, Mississippi law requires extensive findings of either a crime or fraud, if production of the documents is ordered. Contrary to the insistence of Movant and his counsel, the findings are just that, preliminary.

Applicable Law

Mr. Wallace's Motion for Limited Recusal is not well-taken for several reasons. First, the matter before the court is not an issue of criminal contempt. Second, Eaton and its counsel, including Mr. Wallace, were on notice that the documents submitted by Eaton would be subject to an analysis under the "crime-fraud exception." Finally, Eaton has many attorneys of record in this matter. Though several out of town attorneys have been named in the context of the

discovery violations, Mr. Wallace has not. Yet, Mr. Wallace is the only Eaton attorney to file requesting the relief discussed herein. The Court finds that the relief requested is not warranted, and is, at the very least, premature.

First, there is no criminal contempt matter before this Court. Mr. Wallace relies heavily on the case of *In re McDonald*, 98 So.3d 1040 (Miss. 2012), which is factually distinguishable in many regards from the case *sub judice*. First, and most importantly, *McDonald* does not mention a discovery violation, the very issue before this Court. [1] Mr. Wallace is certainly correct that criminal contempt proceedings *can* also apply in the context of discovery sanctions. However, at this time criminal contempt is wholly inapplicable to the subject proceedings. [2] Certainly, Mississippi law provides that "[s]tate courts have the authority under Rule 37 to impose purely monetary, noncompensatory fines for a violation of a discovery order." *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 867 (Miss. 2004). However, Movant fails to acknowledge that M.R.C.P. 37 and the applicable case law provide that a finding of contempt is only required when the sanction is "[t]o impose a purely punitive, noncompensatory fine." *Id.* Under those circumstances, "the offending party must be held in contempt." *Id.* As stated, the Court has no intention to impose any monetary, noncompensatory fines under the subject circumstances. Should the Court's intent change in this regard, the Court will re-visit the applicable contempt law, including the involvement of an additional jurist, if necessary.

Second, Mr. Wallace's claim of "lack of notice" is misstated. As previously indicated, this Court's May 10, 2012 Order left no doubts as to the procedure and intentions of the Court

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[1] The Court notes that Mr. Wallace was appellate counsel in *McDonald*, yielding no doubt as to Mr. Wallace's knowledge of and success in the area of criminal contempt law. However, it does not apply here.

[2] On November 9, 2012, Mr. Wallace filed a Motion for Clarification and Disclosure. While it is unorthodox for the Court to indicate its future intentions regarding a case or matters before it, the Court feels compelled to definitively state that, at this time, it has no intention to issue any *sua sponte* sanctions related to the matter *sub judice*, nor has it ever done so in the past. Accordingly, discovery sanctions, if any, would be the result of a motion by a party. As counsel is already aware, Frisby has filed a Motion to Strike Eaton's Answer as a discovery sanction, which remains pending before this Court. The Court cannot go any further with its sanctions analysis until it rules on that motion.

regarding any additional documents submitted by Eaton. The Court specified: "The Court (and the Special Master, if necessary) [footnote omitted] will consider and rule on the applicability of the "crime-fraud" exception regarding any documents produced, as required and as expediently as possible, and in consideration of this Court's previous rulings regarding similar documents, as acknowledged by Eaton." *May 10, 2012 Order*, pg. 7. However, Mr. Wallace's reply brief mistakenly states the following: "Fraud findings were made against Eaton's counsel without, prior thereto, a semblance of advance notice to Mr. Wallace or anyone else, much less a chance to be heard." *Wallace Reply*, pg. 2. In fact, the advance notice was clear in the May 10 Order, and the Court *held* a hearing on the Report & Recommendation of the Special Master on this matter. At the hearing, Mr. Wallace presented argument on behalf of Eaton. Further, Mr. Wallace's demand for "notice" relates to his criminal contempt analysis, which is inapplicable.

In sum, this Court spent an inordinate amount of time combing through thousands of pages submitted by Eaton in the context of analyzing the applicability of M.R.E. 502(d)(1)'s "crime-fraud exception" as to each document. The September 19, 2012 Opinion of this Court was the result. While Eaton may have been surprised by the Court's *findings* in the September 19, 2012 opinion, Eaton undoubtedly had notice of the *procedure* utilized. No surprise there. Accordingly, Mr. Wallace's procedural complaints are not well-taken.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED that the Motion to Recuse for Limited Purpose filed by non-party Michael B. Wallace is not well-taken and should be DENIED, based upon the analysis herein and upon the grounds cited by the Frisby Counter-Plaintiffs.

So Ordered and Adjudged this the 18TH day of December, 2012.

Circuit Court Judge